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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

January 15, 1999

SUMMARY OF EX PARTE PRESENTATION

Magalie Roman Salas
Secretary
Federal Communications Commission
445 - 12th Street, SW - TW-A325
Washington, D.C. 20554

Re: State of Minnesota Petition for Declaratory Ruling
CC Docket No. 98-1

Dear Ms. Roman Salas:

On January 14, 1999, the undersigned, along with Richard D. Keane, Manager, Pine Island Telephone Company, and Michael J. Nowick, Executive Secretary-Treasurer, Minnesota Telephone Association, met with Anita Wallgren and Linda Kinney, legal advisors from the Office of Commissioner Susan Ness with respect to the petition for declaratory ruling filed by the State of Minnesota concerning access to freeway rights-of-way under Section 253 of the Communications Act. A summary of the points made during this meeting are contained in the two attachments hereto.

In accordance with Commission Rule 1.1206(b)(2), an original and one copy of this letter, as well as the summaries attached hereto, are being filed with you for inclusion in the record in the above-referenced proceeding. Please contact me if you have any questions.

Sincerely,

Lawrence E. Sarjeant

Lawrence E. Sarjeant
VP Regulatory Affairs & General Counsel

attachments
cc: Anita Wallgren
Linda Kinney

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**MINNESOTA TELEPHONE ASSOCIATION
FCC DOCKET NO. 98-1
NOVEMBER 24, 1998**

State would grant exclusive physical access to approximately 1,050 miles of freeway for 10-20 years, in return for free use of at least 20% of the lit fiber, plus 10 dark fibers.

State's plan violates 253(a) and is not within 253(b) or (c); it should be preempted.

- The cost advantage of 30-40% for the favored contractor has the effect of prohibiting competitive entry.

Violation not justified under 253(b) or (c).

- Reducing the degree of the exclusive rights may reduce State's economic bargain from ROW, but maximizing bargain for State does not justify violation of 253(a) in any exception under 253(b) or (c).

Not justified under 253(b) because it is neither "necessary" nor "competitively neutral."

- Cost savings for State not within permissible objectives under 253(b).
- Safety can be fully achieved through less restrictive means.
- Intelligent highway can be built without monopoly on right to construct; competition will increase supply of communications capability.
- Exclusive contract not required for management of right of way or as compensation and is not competitively neutral.

Not justified under 253(c) because beyond scope of ROW management and discriminatory.

- Capacity is far beyond Intelligent Transportation System needs.
- Discrimination is clear.

State's proposed exception under 253(b) and (c) would swallow rule of 253(a). PUC of Texas

Other Less Restrictive Approaches Are Available to States.

The exclusive Freeway use provisions of this Agreement are an unlawful barrier to competition that violate Section 253(a) of the Act, which are neither necessary to preserve public safety nor competitively neutral.¹

The barter reflected in the Agreement is neither fair and reasonable nor competitively neutral because the quantity of free network capacity obtained by the State was directly dependent on granting to one provider a discriminatory advantage of exclusive occupancy.

A State can impose competitively neutral construction standards to assure safety, including reasonable restrictions on construction activity in Freeway ROWs. Such standards have already been adopted by many states, including Minnesota's Guidelines that were approved by the Federal Highway Administration in 1990.²

Specific safety standards could include requirements: 1) that no construction occur on the traveled roadway or shoulders of Freeways; 2) that all construction in a given Freeway ROW location occur within a specified period each year; and 3) that multiple conduits or innerducts be installed if needed in congested areas, such as in urban areas with limited Freeway ROW space or in the areas of interchanges, to allow others to install more fiber without more plowing.

If a conduit system is used in some congested areas instead of periodic construction, the conduit system must; 1) be large enough to accommodate all anticipated users; 2) require addition of more conduits if the original capacity is exhausted; 3) provide for later occupants to pay only a reasonable portion of costs³; and 4) contain independent control of rates for later users.⁴

The Amendment dated October 19, 1998 fails to meet the requirements of the Act because limiting other service providers to use of the Exclusive Contractor's conduit is unnecessary to meet public safety requirements in rural, uncongested areas. Further, the Amendment: 1) does not require the Exclusive Contractor to install any conduit, much less enough conduit; 2) does not require addition of more conduit if the original conduit capacity is exhausted; 3) does not set standards for occupancy rates to be paid by later service providers; and 4) does not provide for independent oversight of those rates.

¹ There are many recognized options for use of ROW by States. See, AASHTO Guidance, Exhibit 5 to MTA Opposition, pp 14-15. Minnesota was also aware that a "single partner" option may not be legal under the Act. See Exhibit 5, pp 15-16.

² See, Exhibit 7, pp 11-13 to MTA Opposition.

³ See, pp 13-14 of Exhibit 7.

⁴ These factors were known by MnDOT. (See, pp 16-19 of Exhibit 7).